back to the agency for further proceedings necessary to achieve compliance. See *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

B. Failure to Address Impacts Associated with Creation and Transport of Radioactive Waste

The Commission upheld in summary fashion the ASLB's rejection of consideration of the Tribe's contention that NRC Staff failed to analyze the impacts of creation, storage, transport, and disposal of radioactive waste. CLI-16-20 (slip.op.) at 13-14. JA__. The Tribe raised this issue three separate times, only to have the Board side-step the issue each time. Id. Under applicable regulations, the Board must admit a contention where an intervenor provides (a) "a specific statement of the issue of law or fact to be raised," (b) an explanation as to how "the issue raised . . . is within the scope of the proceeding," and (c) "sufficient information to show that a genuine dispute exists . . . ." 10 C.F.R. § 2.309(f)(1). The Commission upheld the ASLB's ruling that the Tribe failed to "substantively dispute the analysis of impacts" in the FSEIS. CLI-16-20 (slip.op.) at 13. However, the Commission failed to review or cite any of the Tribe's filings, which do provide a "substantive" dispute. As such, the Commission's ruling is without basis in, and contrary to, the record. See Tribe's contention pleadings. JA__. One proper remedy would be a remand for the NRC to consider this issue. However, this Court should take up the issue, as it is a matter of law that does not require the development of a factual record.

The FSEIS designates the White Mesa Uranium Mill near the White Mesa Ute Community in Utah as the site for disposal of more than 300 cubic yards of radioactive 11e2 byproduct wastes generated annually by at the proposed Powertech facility and other ISL facilities in the region. FSEIS at 2-53. JA__. However, the White Mesa Mill is not licensed to receive or dispose of Powertech's radioactive wastes. The license does not authorize Powertech to dispose of solid 11e2 byproduct Material at White Mesa. No NRC NEPA document addresses the cumulative impact or alternatives to using the White Mesa Mill as the disposal facility for the radioactive wastes.

The FSEIS fails to provide a meaningful review of foreseeable impacts of the wastes by merely stating that permanent disposal will occur in conformance with applicable laws, but without analysis of the applicable criteria of regulations applicable to 11e2 byproduct material disposal. FSEIS at 2-53. JA__. This failure to analyze the creation, storage, transport, and disposal of radioactive waste violates NEPA and implementing regulations. *New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012), *accord*, 40 C.F.R. § 1500.1(b).

Instead, NRC must ensure that the impacts and alternatives of creation, storage, and disposal of radioactive wastes are fully analyzed and addressed. Permanent disposal of solid 11e2 byproduct material is a central feature of the modern Uranium Mill Tailings Radiation Control Act licensing regime under

which Powertech seeks to operate its ISL facility. 10 C.F.R. Part 40, Appendix A. Nowhere do NRC regulations or NEPA allow reliance on the mere assertion that 11e2 byproduct materials will be handled in accordance with applicable law without further analysis. The opposite is required by federal law: the FSEIS firmly identifies the White Mesa Mill as the repository for its waste, and the FSEIS must analyze all impacts and alternatives involved with disposing of wastes created at an ISL facility, including the permanent disposal of 11e2 byproduct materials generated at the facility. The FSEIS reveals that Powertech proposes to create and store 11e2 byproduct materials on site for an indefinite period, with no disposal license, and no analysis of the impacts or alternatives to shipment and disposal at White Mesa. FSEIS at 3-116, 4-237. JA__.

The relevant regulations applicable to new uranium processing operations state in plain language:

> ***Every applicant for a license to possess and use source material in conjunction with uranium or thorium milling***, or byproduct material at sites formerly associated with such milling, ***is required by the provisions of § 40.31(h) to include in a license application proposed specifications relating to*** milling operations and ***the disposition of tailings or wastes resulting from such milling activities***.

10 C.F.R. Part 40 Appendix A (emphasis added). This regulation and NEPA require NRC to ensure that the specific proposal include plans for disposition of tailings and wastes. However, the FSEIS confirms that the White Mesa mill lacks

a license from Utah to accept and dispose of the wastes created by the draft license or other NRC-licensed ISL facilities in the region. FSEIS at 3-116. JA__.

Interstate transportation impacts across the Intermountain West are recognized, but are dismissed without specific analysis asserted on the naked assertion that impacts of shipping yellowcake to Tennessee in sealed containers poses the same risks as shipping 11e2 byproduct materials across the Intermountain West, for disposal at White Mesa. FSEIS at 4-22. JA__. The FSEIS presents no information on the type of containers that would be required for the shipments to White Mesa and no corresponding information on the moisture content of the11e2 byproduct materials or the anticipated decommissioning wastes. FSEIS at 4-22. JA__.

Ongoing NRC problems with delaying waste disposal decisions until after wastes are created should confirm that NEPA analysis and UMTRCA licensing cannot reasonably wait until a later time to be determined after the waste-generated activity is licensed. See *New York v. NRC*, 681 F.3d 471, 483 (D.C. Cir. 2012)(rejecting NRC attempts to avoid NEPA analysis of permanent disposal options).

NEPA regulations specifically require the agency to review all direct, indirect, and cumulative impacts related to the activity under review. 40 C.F.R. §§1502.16, 1508.8, 1508.25(c). Direct effects are caused by the action and occur

at the same time and place as the proposed project. §1508.8(a). Indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. §1508.8(b). Types of impacts include "effects on natural resources and on the components, structures, and functioning of affected ecosystems," as well as "aesthetic, historic, cultural, economic, social or health [effects]." Id. Cumulative effects are defined as:

> [T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. §1508.7.

Federal courts have rejected the argument that an EIS for a mining operation did not have to fully review the impacts from off-site ore processing and transportation. In *South Fork Band Council of W. Shoshone of Nev. v. Dep't of the Interior,* 588 F.3d 718, 725 (9th Cir. 2009), the Ninth Circuit found that an EIS violated NEPA in reviewing and approving a mining plan because it failed to evaluate the environmental impacts of transporting and processing the ore at an off-site facility. "The air quality impacts associated with transport and off-site processing of the five million tons of refractory ore are prime examples of indirect effects that NEPA requires be considered." Id.

In another decision considering a challenge to federal approval of mineral leasing and mining, the court required an agency to look at the impacts from the proposed mill that would process ore from mines/leases, despite the fact that the proposed mill would be on private lands and despite the fact that the mill was not directly associated with the mines/leases being proposed and was not included in the lease/mining proposals. *Colorado Environmental Coalition v. Office of Legacy Management*, 819 F.Supp.2d 1193, 1212 (D. Colo. 2011). Similarly, here, the agency's failure to analyze the impacts from the processing and transportation of the ore from the Dewey-Burdock site violates NEPA.

C. The FSEIS Fails to Adequately Analyze the Groundwater Quality Impacts Associated with the Thousands of Abandoned Boreholes and Faults at the Site.

The Commission upheld the Board's finding of a NEPA deficiency regarding hydrogeological information, but excused this violation based on a new license condition added to cure this deficiency. See CLI-16-20 (slip.op.)(Baran Dissent) at 66, FN2. Thus, instead of conducting the required NEPA analysis, the agency relies on a license condition requiring the applicant to submit adequate hydrogeologic data – but only **after** the NEPA process is completed, after a license is issued, and with no chance for any public review. See e.g., FSEIS at E-51 ("The commenter is correct in stating that wellfield hydrogeologic data packages will not be made available for public review. However, by license condition, all wellfield